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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER M. WOLAK, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Walter M. Wolak, Jr. was jury tried in U.S. District Court on a charge of felon in possession of firearm. Witness John Pruitt testified that Wolak pulled a gun on him during an argument, that Pruitt and Wolak struggled over the gun, and that Pruitt wrested the gun from Wolak and gave it to a store employee. Petitioner Wolak testified that Pruitt pulled the gun on Wolak, that Pruitt and Wolak struggled over the gun, and that Wolak and Pruitt released the gun to the store employee.

A request to instruct on the defense of temporary innocent possession was denied. The judge instructed the jury that any possession of the firearm by Wolak, even jointly with Pruitt, made Wolak guilty. Wolak was convicted, and a sentence of 20 years imprisonment ultimately was imposed.

Question 1: Does a defendant charged with felon in possession of firearm, who testifies he only grabbed the gun momentarily to thwart a man attacking him with that very gun, have the right to a jury instruction on the defense of temporary innocent possession?

Question 2: Can refusal to give a requested jury instruction on a defense supported by the evidence ever be harmless error?

Question 3: Can incorrect jury instructions be considered harmless error where the instructions compel conviction even if the defense testimony supporting a valid defense is believed?

Question 4: In a case involving a credibility dispute between the defendant and a witness, is it proper to exclude the witness's criminal record while fully bringing out the defendant's criminal record?

Question 5: Where the witness's criminal record is excluded, may the prosecutor properly portray the defendant as a convicted felon, and the witness as "an ordinary citizen"?

Question 6: Is it proper to exclude a statement that meets the F.R.E. requirements for an excited utterance, on the ground that additional reliability is needed for admission?

Question 7: Should the alleged statement of Petitioner have been excluded for *Miranda* and discovery violations?

Question 8: Does a charge of possession of firearm by a person with 3 prior convictions for crimes of drugs or violence, contrary to 18 U.S.C. §§ 922(g)(1) and 924(e), require arraignment and trial on that charge?

Question 9: Does 18 U.S.C. § 924(e)(1) authorize judges to impose sentences greater than 15 years by language stating that the sentence should be "not less than 15 years," where no maximum sentence other than 15 years is specified?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Walter Wolak, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued January 18, 1991.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals of January 18, 1991 is attached as Appendix A.

STATEMENT OF JURISDICTION

This case began as a criminal prosecution in U.S. District Court, with jurisdiction under 18 U.S.C. § 3231. The final judgment of the U.S. Court of Appeals for the Sixth Circuit affirming the District Court but remanding for resentencing was entered January 18, 1991. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

"No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law[.]"

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him[.]"

STATUTES INVOLVED

18 U.S.C. § 922(g)(1) states:

"It shall be unlawful for any person--(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, and firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 924(a)(1)(B) provides:

"...[W]hoever...knowingly violates subsection (a)(4), (a)(6), (f), (g), (i), (j), or (k) of section 922 ... shall be fined not more than $5,000, imprisoned not more than five years, or both[.]"

18 U.S.C. § 924(e)(1) provides:

"In the case of a person who violated section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years[.]"

RULES OF EVIDENCE INVOLVED

F.R.E. 401 provides:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

F.R.E. 402 provides:

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

F.R.E. 803(2) provides:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

RULES OF CRIMINAL PROCEDURE INVOLVED

F.R.Crim.P. 16(a)(1)(A) provides:

"Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; [and] the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent[.]"

STATEMENT OF THE CASE

Petitioner Walter M. Wolak, Jr., was tried on an indictment charging that on May 5, 1989, he was a felon in possession of a firearm, contrary to 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e). On July 7, 1989, the prosecutor served Defendant with a Notice Specifying Defendant as an Armed Career Criminal. The notice specified that Defendant Wolak had prior convictions of: conspiracy to distribute heroin (1982), conspiracy to distribute heroin (1976), and attempted felonious assault (1972).

Trial was conducted in U.S. District Court, Eastern District of Michigan, before the Hon. Bernard A. Friedman, on August 14, 21, and 28, 1989. A verdict of guilty of felon in possession of firearm was entered August 28, 1989. No jury trial was held on the issue of whether Defendant was an Armed Career Criminal, despite a defense motion.

Defendant's sentencing guidelines were 151 to 188 months. On November 8, 1989, Judge Friedman sentenced Defendant to prison for 20 years (240 months), followed by 3 years of supervised release. On appeal to the Sixth Circuit, the Court remanded for resentencing, and denied all other requested relief.

John Pruitt (who is black) testified that Wolak (who is white) pulled out a gun and pointed it at Pruitt during an argument at Steve's Party Store in Hamtramck, Michigan. (T Aug 14, 204). Pruitt testified that he was in line ahead of Wolak, and left the line to get a wine cooler. Pruitt then went to a different line. (T Aug 14, 208-209). According to Pruitt, Wolak left his own line and criticized Pruitt for cutting in line, and called Pruitt a "nigger". Pruitt then threatened to "knock him to his goddamn knees." (T Aug 14, 203). According to Pruitt, Wolak then pulled the gun from his waistband and pointed it at Pruitt's head. (T Aug 14, 204).

According to Pruitt, the two men struggled for the gun. Pruitt disarmed Wolak, and gave the gun to "the Arab gentleman" (witness Fouad Safi). (T Aug 14, 205-206).

Before trial, Pruitt had told ATF Special Agent Lee that he had returned to the same line he had left, and that Wolak objected to being cut in front of. (T Aug 14, 211). At trial, Pruitt testified that he did not return to the same line, but instead brought the wine cooler to the second window, where there was no line. (T Aug 10, 208-211).

Petitioner Walter Wolak testified that Pruitt cut in line in front of Wolak and others, and Wolak tapped him on the shoulder and criticized him. Pruitt then threatened Wolak, and pulled out a gun and pointed it at Wolak. (T Aug 21,120-121).

Wolak grabbed for the gun, and the two men struggled for it. Wolak motioned for store employee Fouad Safi to come forward. According to Wolak, he and Pruitt released the gun to Mr. Safi at the same time. (T Aug 21, 122-123). Wolak testified that when Pruitt pulled out the gun, Wolak grabbed the gun because he was scared that Pruitt was going to shoot him. (T Aug 21, 121).

Defense counsel opposed the prosecutor's motion to exclude testimony that John Pruitt had a criminal conviction in Michigan for criminal sexual conduct in the third degree, a felony. The judge ruled that the matter would be excluded. (T Aug 14, 17-23, 164-165).

Witness Fouad Safi, a store employee, testified that he originally told ATF Agent Lee that he did not know which of the two men had produced the gun. (T Aug 14, 243). He was visited by Agent Lee again, and this time Agent Lee gave him "clear pictures about the white man." (T Aug 14, 244). He then changed his story and said he was sure that

Wolak, the white man, had produced the gun. (T Aug 14, 244).

Another witness was Steven LaPyrne (incorrectly identified in the transcript as "Steven LaPolapyrne"), a young white man. Steven LaPyrne's original written statement to police said that "one of them pulled out a gun." (T Aug 21, 50). Subsequently, he wrote on the written statement that it was the white man who pulled out the gun. (T Aug 21, 50-51). At first, LaPyrne denied adding the statement while in the presence of police officers, and then admitted that he added it while being interviewed by Det. Budnick. (T Aug 21, 52-54).

Before trial began, counsel filed a written motion regarding an alleged confession by Defendant Wolak. On Thursday before trial (August 10, 1989) the prosecutor called counsel to inform him that Officer Michael Schamanski of the Hamtramck Police Department had just informed her that Defendant Wolak had, on the date of the arrest (May 5, 1989), confessed to carrying the gun. (T Aug 14, 4). Counsel moved to suppress the alleged confession on the grounds of discovery violation and *Miranda* violation. (T Aug 14, 4-16). After a hearing outside the presence of the jury (T Aug 14, 137-162), suppression was denied. (T Aug 14, 160-162).

Officer Schamanski testified that he received a radio call indicating a man with a gun at Steve's Party Store. (T Aug 14, 138). Officer Mathias testified that when they arrived, people in the store were pointing out Defendant Wolak as the perpetrator. (T Aug 14, 124). Officer Schamanski testified that "I immediately proceed to the defendant, Mr. Wolak, and began to question him in regards to what was taking place here." (T Aug 14, 168). Officer Schamanski testified that Mr. Wolak allegedly confessed that "I pulled my gun out" because he was afraid he

was going to be assaulted. (T Aug 14, 140-141).

The record shows that the police reports and other documents turned over to defense counsel did not include any confession, and included several affirmative statements that there was no confession. (T Aug 14, 4-6, 9-11, 150-151; Pretrial Conference Summary Order, Docket R17). Officer Schamanski had been interviewed by ATF Special Agent Gerald Lee, the officer in charge of the case, "several times over the phone and once or twice in person." (T Aug 14, 151). Officer Schamanski testified that on none of those occasions did he inform Agent Lee that the Defendant had allegedly confessed. (T Aug 14, 151-152, 178-183). Defendant denied making the alleged confession. (T Aug 21, 125-126).

Agent Lee testified that there were no identifiable fingerprints on the gun. They chose not to check the bullets in the gun for fingerprints. (T Aug 14, 94-96).

Defense witnesses Charles Wilson, Chester Kowalski, and Peter Hamlin all testified to knowing Defendant Wolak, that he had numerous black friends, never expressed hatred towards black people, and never used the term "nigger." (T Aug 21, 81, 85, 92).

Peter Hamlin testified that he was playing pool with Defendant Wolak on the night in question at Adams Corner Bar, near Steve's Party Store. (T Aug 21, 92-93). He was in a position to see a gun in a waistband, but saw no gun. (T Aug 21, 93). Wolak said he was going to go across the street to get cigarettes. (T Aug 21, 93).

Certain proffered defense evidence was excluded from admission, and certain defense motions were denied, as discussed infra.

REASONS FOR GRANTING THE WRIT

Question 1: Does a defendant charged with felon in possession of firearm, who testifies he only grabbed the gun momentarily to thwart a man attacking him with that very gun, have the right to a jury instruction on the defense of temporary innocent possession?

Question 2: Can refusal to give a requested jury instruction on a defense supported by the evidence ever be harmless error?

Question 3: Can incorrect jury instructions be considered harmless error where the instructions compel conviction even if the defense testimony supporting a valid defense is believed?

Petitioner Walter M. Wolak, Jr. was charged with felon in possession of a firearm and with having three or more convictions for violence or drugs. Wolak testified that witness John Pruitt pulled the gun on Wolak during an argument in a line at a store, that Wolak grabbed at the gun to protect himself, and that he and Pruitt held the gun jointly for a moment while struggling for it. Ultimately, a store employee took the gun away from Pruitt and Petitioner.

Petitioner requested a jury instruction on the defense of temporary innocent possession. In *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982), the Court held that there is such a thing as the defense of temporary innocent possession of a firearm by a convicted felon. A felon may temporarily grab or possess a firearm to defeat an assault being committed with the firearm. Specifically, the Court in *Panter* held:

> "Where a convicted felon, reacting out of a reasonable fear for the life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary

possession of a firearm for the purpose of defending himself, he is not guilty."

The existence of this defense is well recognized in several circuits. See *United States v. Gant*, 691 F.2d 1159 (5th Cir. 1982); *United States v. Singleton*, 902 F.2d 471 (6th Cir. 1990); *United States v. Stover*, 822 F.2d 48, 50 (8th Cir. 1987); *United States v. Pirovolos*, 844 F.2d 415 (7th Cir. 1987); *United States v. Darrell*, 758 F.2d 427, 431 (9th Cir. 1985); *United States v. Vigil*, 743 F.2d 751, 755 (10th Cir. 1984).

Despite a clear, specific and timely request, the trial court refused to instruct on the defense. The Sixth Circuit held the error to be harmless.

Until now, it has always been held that a defendant in a criminal case is entitled under the Due Process Clause to have the trial judge instruct the jury on a defense for which there is any foundation in the evidence. *Morrisette v. United States*, 342 U.S. 246; 72 S.Ct. 240; 96 L.Ed 288 (1952); *Strauss v. United States*, 376 F.2d 416 (5th Cir. 1967); *United States v. Timberlake*, 559 F.2d 375 (5th Cir. 1977); *United States ex. rel. Peery v. Sielaff*, 615 F.2d 402 (7th Cir. 1979); *United States v. Hicks*, 748 F.2d 854 (4th Cir. 1984); U.S. Const., Amend. V. Denying an instruction on a defense supported by any evidence acts as a directed verdict as to that defense, which is unconstitutional. *Rose v. Clark*, 478 U.S. 570, 578; 106 S.Ct. 3101; 92 L.Ed.2d 460 (1986); *Strauss v. United States*, supra.

The jury was unable to decide whether Petitioner's admitted possession of the firearm met the standards for temporary innocent possession, because they were never told that such a defense existed. Rather, they were told that if there was possession, they must convict.

The finding that harmless error is possible is in intolerable conflict with *Rose v. Clark*, which holds that "harmless-error analysis ... would not apply if the court directed a verdict for the prosecution in a criminal trial." In *Strauss v. United States*, supra, the Court concluded that refusing to instruct on a defense supported by the evidence amounted to a directed verdict against that defense. In *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168 (6th Cir. 1986), the Court concluded that the *Rose v. Clark* "no harmless-error" rule applied where the court directs a verdict on a defense:

> "when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless."

Morrisette v. United States also reversed a conviction for refusal to instruct on a defense supported by the evidence, even though the trial judge found the defense unbelievable. In *Rose v. Clark*, the Court noted that even overwhelming evidence cannot justify taking a jury issue away from the jury: "Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty."

The instant opinion holds that it can be harmless error to refuse to instruct on a defense supported by the evidence. The ruling therefore directly conflicts with *Morrisette v. United States* and *Rose v. Clark*. This Court should grant certiorari to reaffirm the principle that a defendant cannot be denied an instruction on a valid defense supported by the evidence, and that denial of a jury trial on the issue of temporary innocent

possession can never be harmless error when supported by the evidence.

In finding harmless error, the Court suggested that "it borders on the absurd" to think that the jurors would fail to apply the temporary innocent possession defense. (Opinion, 9). In other words, the Court of Appeals found that the jurors necessarily disobeyed the judge's instructions, and necessarily did apply a defense they were never told of. This Court should grant certiorari to establish that a finding of harmless error can never be based on a supposition that the jurors disobeyed the instructions of the judge.

It may be absurd to refuse to apply the defense to Petitioner, but the trial judge committed the very act they call absurd. The judge ruled that Petitioner was not legally entitled to this defense even if his testimony were believed. If the trial judge did not think that Petitioner was entitled to this defense, how can it be said that the jury necessarily would think differently, and would hold those beliefs so strongly that they would be willing to reject the judge's instructions to enforce their disagreement? If Petitioner is entitled to the defense, he is entitled to the instruction.

Further, the failure to instruct on the defense on temporary innocent possession in this case could not be harmless error, in light of the evidence and instructions given by the judge. The judge stated that the prosecutor must show that the Defendant possessed the gun. (T Aug 28, 87-88). He then defined "possession" as follows (T Aug 28, 89):

> "The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

> You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others."

The only possible purpose and effect of this instruction is to convict Wolak if he possessed the gun jointly while trying to grab it away from his attacker.

Under these instructions, if the jury believed Petitioner Wolak, they would nevertheless be forced to conclude that he possessed the firearm and was guilty of the crime. Grabbing the firearm that Pruitt aimed at him, under these instructions, made Wolak guilty of "joint possession" and therefore guilty of possession. Under these circumstances, it was essential that the jury know that temporary joint possession that consists of grabbing a gun to thwart an ongoing assault does not constitute a criminal act.

Petitioner Wolak's testimony, if believed, constitutes a complete defense to the crime charged. The instructions as given guaranteed that the jury must convict Wolak even if they believed his testimony.

The failure to instruct on temporary innocent possession made the whole trial a pointless waste of time. Wolak admitted grabbing the gun; the only factual issue at the trial should have been who produced the gun. The instructions, without the critical instructions on temporary innocent possession, made the factual issue irrelevant. **The instructions wrongly made temporary innocent possession a crime, instead of the complete defense to the crime that it was.**

Another factor supporting the grant of certiorari is that at the time of this trial, Judge Friedman was a new judge to the District Court bench.

and is still relatively new. As defense counsel complained to the Court before the jury was instructed (T Aug 28, 6-7):

> "In my view, judge, if the Court does not give this instruction, it means the trial was for nothing. That if the jury believes Mr. Wolak's story that he grabbed the gun only for a moment to protect himself, under your instructions the jury's going to have to convict him anyway because he did--during that moment--have some kind of possession of the gun, even though it may have been shared with somebody else.
>
> If the jury does convict Mr. Wolak, we won't know whether they've convicted him for bringing the gun in there or for grabbing it. And, therefore, I submit that is error to omit that."

Regardless of whether the error was harmless, Judge Friedman ignored an argument that was so clear and compelling that his ignoring of it was an abuse of discretion. A new federal judge, holding life tenure, should be promptly corrected when he goes astray. He should be guided into correctness rather than encouraged into obstinancy. If he is told that he does not need to instruct on defenses, he is not going to, and the quality of justice in his courtroom will suffer for all. The issue therefore goes far beyond the fairness to Petitioner Wolak.

In order to affirm this conviction, the Court of Appeals had to and did trample over several established rules of law. The fact of their doing so in a published opinion means that the instant decision has a great potential for causing havoc in the court system. **If Wolak is not entitled to this instruction on this record, then no one ever will be,** and the defense of temporary innocent possession becomes effectively unusable in the Sixth Circuit. This Court should grant certiorari and hold that the Fifth

Amendment right to due process and the Sixth Amendment right to jury trial mean that jurors must be instructed on defenses where they are supported by the evidence and where instruction is timely sought.

Question 4: In a case involving a credibility dispute between the defendant and a witness, is it proper to exclude the witness's criminal record while fully bringing out the defendant's criminal record?

Question 5: Where the witness's criminal record is excluded, may the prosecutor properly portray the defendant as a convicted felon, and the witness as "an ordinary citizen"?

The prosecutor made a motion before trial to exclude testimony that John Pruitt had a criminal record. (R 21). Defense counsel opposed the motion in writing and orally in court. The judge ruled that the matter would be excluded. (T Aug 14, 17-23, 164-165).

Petitioner submits that the exclusion of this evidence denied him due process and the right to a fair trial under U.S. Const., Amend. V, the right of confrontation under U.S. Const., Amend. VI, and the right to introduce relevant evidence under F.R.E. 402.

Until now, the rule has been that the defense in a criminal case has the right to introduce facts that may tend to show the motivation of an adverse witness to lie. This is part of the constitutional right to confront and cross-examine one's accusers. U.S. Const., Amend. VI; *Davis v. Alaska*, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974). As the Court said in *Davis*, a defendant in a criminal trial has the right "to seek out the truth in the process of defending himself." *Davis v. Alaska*, supra, 415 U.S. at 320.

Accordingly, the defendant in *Davis* was held to have a constitutional right to bring in a juvenile witness's record of juvenile offenses, which were otherwise barred from admission by state law.

In the instant case, Petitioner and Pruitt were struggling over a gun. Pruitt had to say that Petitioner had the gun, because if Petitioner did not have the gun, then Pruitt had to have it. If Pruitt admitted that he himself had the gun, he would be admitting to a federal offense, possession of a firearm by a convicted felon. 18 U.S.C. §922(g)(1). Therefore, Pruitt's circumstance of having a prior conviction was highly relevant to his reason to lie. Whether he had a reason to lie is a "fact that is of consequence to the determination of the action," and therefore the testimony was relevant to witness bias. F.R.E. 401; *United States v. Dunn*, 805 F.2d 1275 (6th Cir. 1986).

The information that Mr. Pruitt had a criminal record that would expose him to felony charges if he admitted he had the gun, is a fact which "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Delaware v. Van Arsdall*, 475 U.S. 673, 679; 106 S.Ct. 1431; 89 L.Ed.2d 674 (1986). The exclusion therefore violated the constitutional right of confrontation.

In accord, see *Olden v. Kentucky*, 488 U.S. ___; 109 S.Ct. 480; 102 L.Ed.2d 513 (1988), holding that the Defendant has the right under Fifth Amendment due process of law and Sixth Amendment right of confrontation "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the credibility of the witness." 102 L.Ed.2d at 519. The Court also stated that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." 102 L.Ed.2d at 159.

In light of the holding in *Olden*, the court's ruling that the evidence must be excluded was clearly erroneous.

Petitioner's criminal record was fully exposed to the jury. A jury that hears that record, but hears no record for Mr. Pruitt, is likely to mistakenly conclude that Pruitt has no record. Excluding the testimony was unfair on that ground as well. It cannot be disputed that hearing lots of evidence about Wolak's being a criminal, while hearing nothing bad about Pruitt, made it highly likely that jurors would believe Pruitt rather than Wolak. However, to a properly informed jury, Pruitt and Wolak would appear similarly situated, and the prosecutor's advantage would dissipate. The prosecutor should not be granted a significant advantage grounded in hiding relevant facts from the jury.

Admissibility of evidence must be available to the defense and the prosecution on equal terms. To hold otherwise is to grant the prosecution a non-reciprocal evidentiary benefit, which denies due process of law. *Wardius v. Oregon*, 412 U.S. 470; 93 S.Ct. 2208; 37 L.Ed.2d 82 (1973).

In this case, the exclusion was particularly unfair because the prosecutor hid behind the exclusion ruling to affirmatively mislead the jury. In her opening statement, the prosecutor declared that John Pruitt was "an ordinary citizen" standing there in the party store. (T Aug 14, 77-78). The prosecutor would not have dared to make such a statement to the jury, but for the fact that she knew that defense counsel was barred from showing it to be false. As defense counsel complained immediately at sidebar (T Aug 14, 80), and later on the record (T Aug 14, 164):

> "During the prosecutor's opening argument we approached the bench and the Court indicated I could put this on the record at a later time.
>
> The prosecutor, in referring--referred to John Wesley

> Pruitt as an ordinary citizen. Of course when she said that she already knew that he was a convicted felon, but knew that the jury would be precluded from hearing that. In my view, she would not have dared to make such a statement if the actual facts could be known to the jury.
>
> In my opinion the prosecutor has now opened the door to testimony for me to prove that he was indeed no ordinary citizen, but in fact a convicted felon who could not legally possess firearms and, if admitted to doing so, would subject himself to federal prosecution.
>
> Therefore, I request the Court review its earlier decision, and now that the prosecutor has opened the door, allow me to introduce evidence of Mr. Pruitt's felony conviction."

In *Napue v. Illinois*, 360 U.S. 264; 79 S.Ct. 1173; 3 L.Ed.2d 217 (1959) and *Giglio v. United States*, 405 U.S. 150; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972), the Court ruled that it is the duty of the Government to correct any false information given to the jury. The Court in *Giglio* stated:

> "As long ago as *Mooney v Holohan*, 294 US 103, 112, 55 S Ct 340, 342, 79 L Ed 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'"

The same rule must apply to deliberate deception in the form of misleading argument as well as misleading evidence. The prosecutor was permitted to call Pruitt an "ordinary citizen," and the defense was barred from introducing evidence to refute that. This denied due process of law.

Question 6: Is it proper to exclude a statement that meets the F.R.E. requirements for an excited utterance, on the ground that additional reliability is needed for admission?

Richard Carter observed the assault and the arrest of Petitioner, and ran across the street to the bar to inform Petitioner's friends of what he saw. The defense sought to admit Carter's statement as an excited utterance. An offer of proof was made that the declarant ran into the bar in an excited state, and excitedly declared that "Whitey" (nickname of Walter Wolak) had just been arrested at the party store, and he did not even have the gun, the other guy did. The judge ruled that it would not be admitted because "I think she [the prosecutor] has a right to cross-examine as to that." (T Aug 21, 88). The Sixth Circuit affirmed on the ground that greater indicia of reliability were needed for admission. (Opinion, 4).

The express language of F.R.E. 803(2) provides a 3 part test for determining admissibility as an excited utterance, *United States v. Moore*, 791 F.2d 566, 570 (7th Cir. 1986); *United States v. Bailey*, 834 F.2d 218 (1st Cir. 1987):

> "1) a startling event or condition occurred; 2) the statement was made while the declarant was under the stress caused by the event or condition; and 3) the statement relates to the startling event or condition."

To observe Whitey being arrested would clearly qualify as a startling event. To observe Whitey being arrested even though the other guy had the gun would even more clearly qualify as a startling event. The declarant, in a state of excitement, ran across the street to tell the other

people in the bar what he had just seen. The statement therefore clearly "relates to the startling event or condition." The statement was nothing more than a description or explanation of the event witnessed. Therefore, the subject matter was precisely what is permitted by F.R.E. 803(2).

Under *United States v. Moore*, supra, 573, if these three requirements stated in F.R.E. 803(2) are met, the excited utterance is admissible, and there is no need for the proponent to show trustworthiness of the statement beyond these three requirements. The Sixth Circuit in this opinion, however, requires more "indicia of reliability" than does the rule.

Other circuits hold that "indicia of reliability" beyond those specified in the rule are not required for long-standing hearsay exceptions. This Court should grant certiorari to determine whether a specific, long-standing hearsay exception requires "indicia of reliability" beyond those specified in the rules of evidence.

Question 7: Should the alleged statement of Petitioner have been excluded for *Miranda* and discovery violations?

On Thursday before trial (August 10, 1989) the prosecutor called defense counsel to inform him that Officer Michael Schamanski of the Hamtramck Police Department had just informed her that Petitioner Wolak had, on the date of the arrest (May 5, 1989), confessed to carrying the gun. (T Aug 14, 4). Counsel moved to suppress the alleged confession on the grounds of discovery violation and *Miranda* violation. *Miranda v. Arizona*, 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966). (T Aug 14, 4-16). After a hearing outside the presence of the jury (T Aug 14,

137-162), suppression was denied. (T Aug 14, 160-162).

Officer Schamanski testified that he received a radio call indicating a man with a gun at Steve's Party Store. (T Aug 14, 138). Officer Mathias testified that when they arrived, people in the store were pointing out Petitioner Wolak as the perpetrator. (T Aug 14, 124). Officer Schamanski testified that "I immediately proceed to the defendant, Mr. Wolak, and began to question him in regards to what was taking place here." (T Aug 14, 168). He went on to testify that "I pulled him on the side -- we were towards the back of the store -- I said, 'Tell me the truth. Basically, what took place here?" (T Aug 14, 168). Officer Schamanski testified that he asked Mr. Wolak what took place, and Mr. Wolak allegedly confessed that "I pulled my gun out" because he was afraid he was going to be assaulted. (T Aug 14, 140-141). Petitioner Wolak denied confessing to the officer.

The Court of Appeals clearly erred by failing to apply *Rhode Island v. Innis*, 446 U.S. 291, 298; 100 S.Ct. 1682; 64 L.Ed.2d 297 (1980), where the Court, quoting from *Miranda*, defined "custodial interrogation" as follows:

> "by custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

There can be no doubt that in this case there was "questioning initiated by law enforcement officers." (T Aug 14, 168). There also can be no doubt that Petitioner was "deprived of his freedom of action in any significant way." The officer testified that Petitioner was not free to leave. (T Aug 14, 148). The officer testified that while he was detaining

Petitioner, he was urging the Petitioner to "Tell me the truth" about what happened. (T Aug 14, 168).

The Government is required to turn over to the defense any statements of the Defendant. F.R.Crim.P. 16(a). The record shows that the police reports and other documents turned over to defense counsel did not include any confession, and included several affirmative statements that there was no confession. (T Aug 14, 4-6, 9-11, 150-151). Office Schamanski had been interviewed by ATF Special Agent Gerald Lee, the officer in charge of the case, "several times over the phone and once or twice in person." (T Aug 14, 151). Officer Schamanski testified that on none of those occasions did he inform Agent Lee that the Petitioner had allegedly confessed. (T Aug 14, 151-152, 178-183).

It was Petitioner's position at trial, and still is, that Officer Schamanski lied, and that there was no confession at all. If there was, Officer Schamanski had a duty to report it. Because he did not report it, defense counsel had a whole series of inaccurate and misleading documents deceiving counsel into believing there was no confession.

In light of the importance of the Defendant's statements to a trial, and to the discovery process, F.R.Crim.P. 16(a), the statements should have been excluded because counsel was not notified about them when they were made, or for months thereafter, until just before trial.

This case provides an opportunity to visit the rules of *Miranda* in a custodial setting at the scene of a crime. It also provides an opportunity to visit the situation of a last minute "confession." In *Taylor v. Illinois*, ___ U.S. ___; 108 S.Ct. 646, 653-655; 98 L.Ed.2d 798 (1988). The Court noted that "One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed." *Taylor* approved

witness preclusion for this very type of violation.

In *Taylor*, the Court observed that the State has an "interest in protecting itself against an eleventh hour defense." 108 S.Ct. at 654. The Court noted that "Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement." 108 S.Ct. at 655. The Court stated that "It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the eleventh hour has passed." 108 S.Ct. at 655.

The issue of jurisprudential significance is whether these same considerations must apply equally to the prosecution. An eleventh hour confession is just as likely to be fabricated as an eleventh hour defense. There is something "suspect" about a witness with a Defendant confession who is not identified until the eleventh hour. A party willing to fabricate a confession will be willing to fabricate an excuse for a discovery violation. The defense has an "interest in protecting itself against an eleventh hour" confession, but that right was not honored by the court.

Question 8: Does a charge of possession of firearm by a person with 3 prior convictions for crimes of drugs or violence, contrary to 18 U.S.C. §§ 922(g)(1) and 924(e), require arraignment and trial on that charge?

On July 7, 1991 the Government provided Petitioner with a form entitled Defendant's Acknowledgement of Superseding Indictment (R16) which states that "I know that if I am convicted or plead guilty, I may be sentenced as follows: Count I - 10 years and/or $250,000 or both."

Petitioner and counsel signed it and it was filed. Petitioner was called upon to acknowledge and plead to this, and was asked to plead to nothing else.

Under 18 U.S.C. § 924(a)(1), the penalty for felon in possession of a firearm is imprisonment for not more than 5 years. Under 18 U.S.C. § 924(e), the penalty for felon with three or more past convictions for crimes of violence or serious drug offenses in possession of a firearm is imprisonment for not less than 15 years. Petitioner was imprisoned for 20 years.

Petitioner objected before trial that he was entitled to a jury trial on whether he was to be convicted under 18 U.S.C. 924(e). The judge took the matter under advisement, and ultimately denied it. (T Aug 14, 26-28; T Aug 21, 6-15). Petitioner requested a jury instruction to have the jury decide whether he was to be convicted under 18 U.S.C. § 924(e), and this was again denied. (T Aug 28, 7).

The statute is unclear about who decides whether the Defendant is guilty under the 15 year provision or the 5 year provision. The statute makes no provision on whether it is the jury or the judge who is to decide whether the Defendant is guilty of being an Armed Career Criminal in possession of a firearm.

It is clear that the decision on ACC has important consequences. The crime of ACC in possession carries a minimum 15 year penalty, while the crime of felon in possession carries a maximum 5 year penalty. Therefore, the status of being an ACC is an essential element of the 15 year offense. To take such a significant decision out of the hands of the jury violates the constitutional right to trial by jury. U.S. Const., Amend. VI.

In *McMillan v. Pennsylvania*, 477 U.S. 79; 106 S.Ct. 2411; 91 L.Ed.2d 67 (1986), a Pennsylvania statute provided that if a person commits certain specified crimes while armed with a weapon, the minimum sentence shall not be less than 5 years. The statute specifically provided that the question of whether the offender was armed is not an element of the crime. 477 U.S. at 81. The Supreme Court held that because weapon possession did not alter the maximum penalty, it would not be considered an element of the crime for federal constitutional purposes. 477 U.S. at 87-88.

In the instant case, the status of having the 3 prior convictions for violent or drug crimes does raise the maximum sentence by a very great degree. Further, Congress did not specify that the enhancing facts were not an element of the crime. Therefore, under *McMillan*, the issue of 3 prior convictions for violent or drug crimes is an element of the offense on which the jury must decide.

In *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986), the Court agreed with Petitioner's position, and ruled that a person must be convicted by a jury of being an ACC in possession of a firearm to be sentenced as an ACC in possession of a firearm. In *United States v. Brewer*, 841 F.2d 667 (6th Cir. 1988), the panel, by a 2 to 1 vote, agreed that the facts necessary to triple the sentence are elements that must be decided by a jury. In *United States v. Brewer*, 853 F.2d 1319 (6th Cir. 1988), the case was reheard, and the panel voted 2 to 1 the other way. The dissent of Judge Merritt, 853 F.2d at 1327-1328, is well reasoned and is the position that this Court should adopt.

The question of whether Congress would have the right to abolish jury trial on whether the greater or lesser offense applies is not presented

here. In this case, the abolition of jury trial was not done by Congress, but by the judge. Congress did not provide that judges were to decide this question. Congress did not state that being an ACC is not an element of the 15 year crime. Congress specified only that felon in possession carries 5 years, while ACC in possession carries at least 15 years.

Because Congress provided that felon in possession carries one penalty, while ACC in possession carries a very much higher penalty, the facts necessary to find ACC constitute an element of the crime.

Given the importance of this issue to the administration of federal criminal justice, and given the division among the Circuits, this Court should grant certiorari and decide the question.

Question 9: Does 18 U.S.C. § 924(e)(1) authorize judges to impose sentences greater than 15 years by language stating that the sentence should be "not less than 15 years," where no maximum sentence other than 15 years is specified?

Petitioner Walter Wolak was convicted of felon in possession of firearm, 18 U.S.C. 922(g)(1). The court sentenced Petitioner under 18 U.S.C. 924(e) [also known as the Armed Career Criminal Act, or ACCA] as a person with three previous convictions for violent felonies or serious drug offenses. The sentence imposed was 20 years imprisonment.

The sentencing statute, 18 U.S.C. 924(e) states that a person sentenced under that section shall be "imprisoned for not less than fifteen years."

Petitioner objected in the trial court that the statute authorizes a sentence of fifteen years, and does not authorize any higher or any lower sentence. The sentence of 20 years is therefore unlawful, as not

authorized by statute. (T Nov 8, 14-16). The prosecutor and judge took the position that the statute authorized any term of years up to life in prison. (T Nov 8, 16-19).

In *Whalen v. United States*, 445 U.S. 684, 690; 100 S.Ct. 1432; 63 L.Ed.2d 715 (1980), the Court held that there is a "constitutional right to be deprived of liberty only to the extent authorized by Congress." The Court in *Whalen* held that judges have sentencing authority only as explicitly authorized by Congress.

If Congress wanted to authorize judges to impose sentences of up to life in prison, they could easily have said so, as they have in other statutes. However, Congress never included in the statute a provision stating that a judge may sentence a person under 18 U.S.C. 924(e)(1) to life in prison, or to 20 years in prison, or to any sentence greater than 15 years.

Since Congress never stated in express terms any authority to impose a sentence higher than 15 years, where would a judge get authority to impose such a sentence? The Court of Appeals cited *United States v. Blannon*, 836 F.2d 843 (4th Cir. 1988), which held: "The statute imposes no upper limit. By implication, the maximum penalty under the ACCA is life imprisonment."

Petitioner submits that judges get their sentencing power through the express language of statutes passed by Congress, and that there is no such thing as sentencing power acquired "by implication." In sentencing, judges do not have the authority to do everything which is not expressly forbidden; judicial sentencing power arises only from express grants of authority.

In *Bifulco v. United States*, 447 U.S. 381, 387; 100 S.Ct. 2247; 65

L.Ed.2d 205 (1980), the Court held that the rule of lenity applies to sentences. In *Dowling v. United States*, 473 U.S. 207, 213; 105 S.Ct. 3127; 87 L.Ed.2d 152 (1985), the Court indicated that whenever a penal statute must be interpreted, the rule of lenity comes into play. The Court held that if there are two possible interpretations of the statute, the more lenient interpretation must hold, except where Congress has spoken clearly and definitely to the contrary. The Court held, 473 U.S. at 213:

> "It is appropriate, before we choose the harsher alternative, that Congress should have spoken in language that is clear and definite."

There is nothing "clear and definite" about a statutory provision where authorization for a sentence in excess of 15 years comes not from the words of the statute, but "by implication." When the Court in *Blannon* admitted that the statutory authority for a sentence higher than 15 years came "by implication," the Court necessarily admitted that Congess did not speak "in language that is clear and definite" as required by *Dowling*.

Sentencing authority cannot be implied through Congressional silence. *Sedima v. Imrex Co.*, 473 U.S. 479, 495; 105 S.Ct. 3275; 87 L.Ed.2d 346 (1985). Since Congress did not say a judge can impose a sentence higher than 15 years, the silence of Congress on this point cannot be used to infer the existence of sentencing authority not explicitly granted.

As the Court held in *Bifulco*, supra, 447 U.S. at 387:

> "The court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be no more than a guess as to what

Congress intended."

The 4th Circuit's ruling in *Blannon* is a direct application of the type of reasoning that the Court explicitly rejected in *Bifulco*. In *Bifulco*, the government argued that sentencing authority for special parole in conspiracy cases could be found by implication. The Supreme Court held that although special parole for conspiracy cases made sense and would be good policy, and was **arguably** authorized by statute, it could not be considered the law of the United States unless stated by Congress in **clear and explicit language.** Vague or uncertain language will always be interpreted according to the rule of lenity to hold that judges do not have any sentencing authority that is not expressly granted by Congress. Implied grants of sentencing authority simply do not exist.

To the extent that "the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Whalen v. United States*, supra, at 694.

This Court should grant certiorari to rule that if Congress wants judges to be able to impose sentences of up to life in prison under the ACCA, it needs only to say so. Because they have not, judges have only the sentencing authority expressly granted, that is, 15 years. No language authorizing a 20 year sentence exists in the statute, and one may not be inferred from Congressional silence. *Sedima v. Imrex Co.*, supra.

Conclusion.

Petitioner Walter M. Wolak, Jr. respectfully submits that for the above reasons, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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Dated: February 26, 1991

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 89-2275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALTER M. WOLAK, JR.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed January 18, 1991

Before: GUY and BOGGS, Circuit Judges; and GRAHAM, District Judge.*

RALPH B. GUY, JR., Circuit Judge. Defendant, Walter Wolak, was convicted after a jury trial of being a felon in possession of a firearm. 18 U.S.C. § 922(g)(1). His sentence was enhanced as a result of his being subject to the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1),[1] and a sentence of 20 years was imposed.

*The Honorable James L. Graham, United States District Court for the Southern District of Ohio, sitting by designation.

[1] 18 U.S.C. § 924(e)(1) reads in relevant part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court

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Wolak appeals both his conviction and his sentence, raising numerous claims of error. Upon a review of the record, we find no error or combination of errors requiring reversal of defendant's conviction but find it necessary to remand for resentencing.

I.

The incident giving rise to this prosecution occurred on May 5, 1989, at 11:35 p.m. in a party store located in Hamtramck, Michigan. Wolak, who is white, had words with a black customer, John Pruitt, when Pruitt allegedly cut in line in front of Wolak. Pruitt allegedly threatened to knock down Wolak, and Wolak drew a pistol from under his shirt and pointed it at Pruitt's head. A struggle ensued involving Wolak, Pruitt, another customer named Steven LaPyrne, and a store employee, Fouad Safi. The pistol ended up in the possession of Safi, who also called the local police. After the police arrived, they talked to Wolak, Pruitt, and the other witnesses. Wolak admitted to the police that he drew the pistol, and he was arrested for assault. After learning of Wolak's extensive criminal record, the case was ultimately turned over to federal authorities, and this prosecution ensued. At trial, Wolak based his defense on the claim that it was Pruitt who had the gun and that Wolak wrestled it away from him.

II.

Although Wolak raises ten separate alleged trial errors, we will discuss together those that are related. We first address various alleged errors in evidentiary rulings.

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referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years ....

A. Exclusion of Pruitt's Criminal Record

Pruitt had a 12-year old conviction (1977) for third degree criminal sexual conduct, a felony. He received a sentence of two years probation. Pursuant to the provisions of Federal Rule of Evidence 609(b), the government moved in advance of trial that this conviction be excluded.[2] The district judge granted the motion. We review district court rulings on evidentiary matters under an abuse of discretion standard. *United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir. 1986). Since Pruitt's conviction was over 10 years old, we are unable to find any abuse of discretion on the part of the trial judge. Although credibility was an issue in this case, the testimony of Pruitt was supported by other witnesses and buttressed by Wolak's admission that Wolak drew the gun.

B. Exclusion of Evidence Allegedly Showing Bias on the Part of Pruitt

Wolak sought to introduce testimony through a long-time friend, Peter Hamlin, that Hamlin had seen Pruitt and another government witness, LaPyrne, talking together in the hall, and that LaPyrne allegedly said he "was going to hang the defendant." Upon investigation by the court, it turned out that LaPyrne was not involved, but perhaps a person who had been in court with LaPyrne was involved. Pruitt had already testified when this alleged conversation took place. The trial court found the whole episode to be fraught with speculation and conjecture and of no probative value. We agree. The

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[2]Fed. R. Evid. 609(b) reads in relevant part:

> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect....

defendant wholly failed to lay any foundation that would have compelled the admission of this type of testimony.

C. Exclusion of Excited Utterance Testimony

Prior to the party store incident, Wolak had been across the street in a bar playing pool. Wolak wanted to offer the statement of one of the persons, Richard Carter, who had been in the bar with him. He did not call Carter to testify. Allegedly, Carter went across to the party store and came back into the bar and said, "They arrested Whitey (Wolak) and that he didn't have a gun, the other guy did." Wolak claims this statement qualified as an excited utterance.[3] We find no abuse of discretion in excluding this statement. There was no claim that Carter was not available to testify and no foundation was laid either to explain his absence or his source of knowledge. To begin with, as we see it, the statement was not an excited utterance. Although Carter may have been concerned about Wolak's arrest, his learning after-the-fact of the arrest of a long-time felon is hardly calculated to produce the spontaneous outburst that the rule envisions. Additionally, the key part of the "utterance" involves conclusions on Carter's part, since there was nothing to indicate that Carter was present when the incident took place or how Carter even became aware of the arrest. In short, the statement did not "contain sufficient indicia of reliability to ensure accuracy in the fact-finding process." *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

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[3]Fed. R. Evid 803 reads in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ....
>
> (2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

D. The Admission of Defendant's Statement Made Prior to *Miranda* Warnings

When the two police officers responded to the "disturbance" call at the party store, they split up and one talked to Pruitt and the other, officer Schamanski, talked to Wolak. The officers had no details on what was going on, if anything, before they arrived, and they did not know what to expect. In trying to determine what happened, officer Schamanski asked Wolak what had happened and Wolak told the officer he was afraid Pruitt was going to assault him so he pulled a gun. Wolak argues that these statements were the product of a custodial interrogation and, since they were not preceded by *Miranda*[4] warnings, should have been suppressed. We disagree.

It is probably true, as Wolak suggests, that at the time he made the statement to Schamanski, he was not free to leave because the officers were not letting anyone leave until they found out what was going on. We do not see this as the type of "custody" envisioned by *Miranda*. Wolak's premise, carried to its logical conclusion, would require officers to announce *Miranda* warnings to everyone present immediately upon arriving at a possible crime scene before they knew what happened or before they could ask any questions. Wolak was not the specific focus of an investigation nor was there anything different from any other police-citizen investigative encounter.

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question....

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Oregon v. Mathiason, 429 U.S. 492, 495 (1977). Here, Wolak was not even a suspect at the time he told the officer what occurred.

Defendant also argues that this statement should have been suppressed as a discovery sanction since it was not revealed to him until a few days prior to trial that the government intended to use this statement. We find no merit to this contention. The assistant United States attorney who tried this case became aware of the statement on the Thursday before the Monday trial was due to start. She notified defense counsel immediately. The statement was not in the police report which had been prepared by Schamanski's partner. Schamanski was a relatively inexperienced police officer and did not appreciate the significance of this piece of evidence until discussing the case with a fellow officer, at which time he immediately contacted the prosecutor.

The district court held a hearing on this issue and concluded there was no intentional wrongdoing. The court also required the government to have the officer who prepared the report available for a defense interview. The trial judge also offered defense counsel an opportunity to further interview Schamanski and a choice as to when Schamanski would testify. Defendant was afforded an opportunity to extensively cross-examine Schamanski and thereby to inform the jury of the underlying circumstances relative to his testimony. Before the testimony of detective Budnik (the officer who prepared the police report), the court gave defendant as much time as he needed to prepare. The action taken by the district court was consistent with our holdings in *United States v. Glover*, 846 F.2d 339 (6th Cir.), *cert. denied*, 488 U.S. 982 (1988), and *United States v. Bartle*, 835 F.2d 646 (6th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988), two cases dealing with a similar issue. In both *Glover* and *Bartle*, we made it clear that we looked to whether there was intentional misconduct, and also looked to what opportunities were given to the defendant to deal adequately with evidence produced late in the game.

III.

Defendant argues that several acts of prosecutorial misconduct occurred. We examine such a claim against the backdrop of the decisions which have held that, to warrant a new trial, the alleged misconduct must be significant enough to have denied defendant a fair trial. *Greer v. Miller*, 483 U.S. 756 (1987). Further, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *United States v. Thomas*, 728 F.2d 313, 320 (6th Cir. 1984) (quoting *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir.), *cert. denied sub nom. Bella v. United States*, 447 U.S. 907 (1980).

All of the alleged acts of misconduct involved statements made or questions asked by the prosecutor. Where contemporaneous objections were made by defense counsel, some were sustained and some were overruled. We find that nothing would be served by reviewing the statements *seriatim* because, individually or collectively, they were not significant enough to have denied defendant a fair trial. Where defense objections were overruled, we agree with the trial judge that there was no impropriety on the part of the prosecutor. Where objections were sustained, we find that the remarks or questions, although better left unsaid or phrased in another manner, were not intentional acts of wrongdoing by the prosecutor.

IV.

Defendant claims that the government failed to prove the interstate or foreign commerce nexus of the offense of which he was convicted. The firearm in question was a Colt, and a Colt employee testified that the pistol in question had been shipped from Connecticut to the United States Government Ordnance Depot in Manila in 1911. On cross-examination, the Colt employee was asked if it was possible that the pistol could have been brought back to Michigan by a serviceman. Since the employee had no knowledge of how the pistol got to Michigan, she

obviously had to answer this question in the affirmative. From this, defendant constructs an argument based upon 18 U.S.C. §§ 925(a)(1) and (2). These sections provide certain exceptions relative to firearms shipped to the United States Government or transported by persons who received such firearms from the government for use in the military. Defendant misreads these sections. They apply, for example, to a convicted felon in the military who, while in the military, possessed a weapon that had moved in interstate commerce. Obviously, the defendant here is not such a person. Even if we were to conjecture that the firearm possessed by Wolak had been brought back from Manila by a serviceman, that transportation would still satisfy the interstate commerce nexus of the offense as to anyone who later possessed the weapon in Michigan other than the military person who transported it. *Scarborough v. United States*, 431 U.S. 563 (1977).

V.

Wolak alleges as error the failure of the trial judge to give an instruction on temporary innocent possession. This instruction was requested because it was defendant's position that the only possession he had of the firearm was when he wrestled it away from Pruitt. Our circuit has recently recognized that a justification defense exists in "rare situations." *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir.), *cert. denied*, 111 S. Ct. 196 (1990). The instruction requested by Wolak read in pertinent part:

> In this case, the defense is raised of temporary innocent possession. "Where a convicted felon, reacting out of reasonable fear for the life or safety of himself, in the actual physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose of defending himself, he is not guilty" of the offenses charged.

The trial judge declined to give this instruction and, instead, gave the standard boilerplate possession

instruction, which is given in almost all criminal cases in which possession is an element of the crime.

In its brief on appeal, the government, applying a four-part test adopted in *Singleton*, argues that the defendant was not entitled to a justification defense because he was the one who initiated the confrontation. We think this argument misses the mark, but nonetheless we find no error requiring reversal stemming from the court's refusal to give the requested instruction. It was clear right from the government's opening statement that the theory of prosecution was that Wolak came into the store with the firearm already in his possession. This made the trial a credibility battle. Both Wolak and Pruitt testified, as well as independent witnesses who corroborated Pruitt's version of the incident. It borders on the absurd to suggest that, if the jury believed that the only time Wolak had the pistol was when he forcibly took it away from Pruitt, they would have returned a guilty verdict. We think the trial judge would have been better advised to give an instruction on the innocent possession theory, although not the one suggested by the defendant as it was fatally flawed because it erroneously stated that "the Government must prove beyond a reasonable doubt that this defense [innocent possession] does not apply to this case." We find, however, under the facts of this case, that the failure to give the instruction was harmless error.

We do extend a caution relative to jury instructions, however. Using the standard boilerplate jury instruction in this case resulted in the jury being instructed on the concepts of joint and constructive possession. Neither joint nor constructive possession was an issue in this case, however, as the government's theory was that Wolak had actual possession of the firearm at all relevant times, and the defense theory was that the gun belonged to Pruitt. Although boilerplate instructions have their place, they should not be used without careful consideration being given to their applicability to the facts and theories of the specific case being tried.

VI.

The defendant's final three claims of error all involve his sentencing. Defendant contends that (1) the court improperly sentenced him under 18 U.S.C. § 924(e) without a proper arraignment or jury trial; (2) the trial court improperly sentenced him to a term in excess of that authorized by Congress, and (3) the trial court improperly sentenced him to a term in excess of that specified in the Sentencing Guidelines.

A. The Application of 18 U.S.C. § 924(e)(1) to the Sentence

At trial, the defendant argued that the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), was a separate offense that required a jury trial and findings by the jury. On appeal, defendant again raises this issue claiming he was denied his constitutional rights. Defendant concedes that in *United States v. Brewer*, 853 F.2d 1319 (6th Cir.) (on reh'g), *cert. denied*, 488 U.S. 946 (1988) and 489 U.S. 1021 (1989), we rejected the same challenge that he now advances. Wolak argues, however, that this court should adopt the position of the dissent in *Brewer*. Even if we agreed with the defendant, we could not overrule the decision of an earlier panel. *Salmi v. Secretary of Health & Human Services.*, 774 F.2d 685, 689 (6th Cir. 1985). Since *Brewer* is controlling, we reject defendant's argument on this issue.

B. The Sentence Authorized by Congress

Wolak was sentenced under the ACCA to a term of 20 years. Defendant contends that this sentence is in excess of the maximum allowed by law. The ACCA requires that a sentencing court impose upon a defendant a mandatory minimum sentence of imprisonment of at least 15 years without parole. It does not, however, set an upper limit on the sentence which a district court may impose. As the Fourth Circuit reasoned, "[b]y implication, the maximum penalty under the ACCA is life

imprisonment." *United States v. Blannon*, 836 F.2d 843, 845 (4th Cir.), *cert. denied*, 486 U.S. 1010 (1988) (upholding 23-year sentence); *see also United States v. Lego*, 855 F.2d 542, 546 (8th Cir. 1988) (upholding 18-year sentence); *United States v. Jackson*, 835 F.2d 1195, 1197 (7th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988) (upholding sentence of life imprisonment).

We join with those circuits that have rejected the argument that a 15-year sentence is the maximum that may be imposed under 18 U.S.C. § 924(e)(1).

C. The Upward Departure From the Guidelines

The Guidelines' range for the defendant's sentence was 151-188 months.[5] The trial judge departed upward and imposed a sentence of 240 months. As justification for the upward departure, the court stated on the record:

> It is my intention to depart from the guidelines in this particular matter for the following reasons:
>
> [First,] I think the Court has to consider the impact on society. I think this kind of crime happened in this particular matter, under the facts as I heard them here, has a major impact in society. Lots of people could have been hurt.
>
> I think that Mr. Wolak showed a total disregard for any of the rules of society in relation to this particular crime. I think he has done so in relation to his whole total life, the way he has conducted his life. I feel sorry for him. I feel sorry for his family and friends. I know that

[5]The offense level was 29 and the criminal history category was VI. Thus, the maximum guideline sentence (188 months) was already in excess of 15 years, so that sentencing at the top of the range would have satisfied the 15-year minimum sentence mandated by 18 U.S.C. § 924(e)(1).

they're here and know they've been here throughout the trial.

....

The Court believes the prior convictions that weren't considered -- and I understand your argument -- and even if they were considered would have to be at certain level and have. I think the fact that -- the nature of the kind of crimes that totally affect society -- that he has been convicted of all of those things.

Taken into consideration, I think that 20 years is the appropriate amount of time that he should serve in relation to this particular matter. I think by that time, hopefully counsel's argument -- and what I would like to think is my belief too -- by that time he will be in a position to not commit anymore crimes. Hopefully, mentally, physically and everything else, society can be protected from him.

(App. 292-93).

In *United States v. Joan*, 883 F.2d 491 (6th Cir. 1989), we set forth the standards to be used in reviewing an upward departure.

First, we assay the circumstances relied on by the district court in determining that the case is sufficiently "unusual" to warrant departure. That review is essentially plenary ....

Second, we determine whether the circumstances, if conceptually proper, actually exist in the particular case. That assessment involves factfinding and the trier's determinations may be set aside only for clear error. *See* 18 U.S.C. § 3742(d).

> Third, once we have assured ourselves that the sentencing court considered circumstances appropriate to the departure equation and that those factors enjoyed adequate record support, the direction and degree of departure must, on appeal, be measured by a standard of reasonableness....

Id. at 494 (quoting *United States v. Diaz-Villafane*, 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989).

When we apply the *Joan* test here, we conclude upon *de novo* review that the circumstances relied on by the district judge do not make this case sufficiently unusual to warrant an upward departure. In reaching this conclusion, we are guided by our recent decision in *United States v. Kennedy*, 893 F.2d 825 (6th Cir. 1990). In *Kennedy*, the trial judge attempted to justify an upward departure based upon "a long history of violation of the law" and the fact that in "the best interest of society . . . you need an extended period of incapacitation." The judge observed that "parole, probation, rehabilitation just has [sic] not worked in your case[.]" *Id.* at 826-27. The comments and the rationale of the trial judge in *Kennedy* are remarkably similar to that of the trial judge here.

We do not interpret our *de novo* review responsibility as a license to second-guess trial judges. Here, however, the very factors which the court found aggravating were the same factors that motivated Congress to pass the ACCA and which led to a criminal history category of VI (the highest) for the defendant. A person with a long criminal history has obviously not learned much from past incarcerations and is indeed a potential threat to society. However, that is why the defendant, who committed an offense with a basic maximum penalty of only five years, ended up with a 15-year minimum sentence being imposed.

In sum, we **AFFIRM** defendant's conviction. I would remand for the imposition of a sentence not less than 15 years, but not greater than 188 months. Judges Boggs and

Graham believe an upward departure may be justified, however, and they would remand for reconsideration and resentencing.[6] Their view thus becomes the majority decision of this panel, and this case is **REMANDED** for resentencing in accordance with our decision in *Kennedy*.

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[6]*See, e.g., United States v. Gonzalez-Lopez*, 911 F.2d 542 (11th Cir. 1990); *United States v. Belanger*, 892 F.2d 473 (6th Cir. 1989); *United States v. Glas*, 1990 WL 179722 (N.D. Ill. Nov. 1, 1990).